EMPLOYMENT TRIBUNALS

Claimant: Mr. Platt

Respondent: Future Cleaning Services Limited

HELD AT: Leeds Employment Tribunal (by CVP) **ON:** 15 July 2021

BEFORE: Employment Judge Buckley

REPRESENTATION:

Claimant: Ms Gumbs (Counsel)
Respondent: Ms Rezaie (Counsel)

RESERVED JUDGMENT ON A PRELIMINARY ISSUE

1. The claimant was an employee within s 230 of the Employment Rights Act 1996 during the period 5 May 2015 to 18 November 2018.

REASONS

1. The issue which I have to determine was agreed as follows:
   1.1 Was the Claimant an employee for the purposes of section 108 of the Employment Rights Act 1996 (ERA) during the period from 5 May 2015 to 18 November 2018?

Witnesses

2. On behalf of the respondent I heard evidence from Mr. Chisholm, founder of the business and chief executive officer at the relevant time. On behalf of the claimant, I heard evidence from the claimant and Ms Dickinson.

3. I did not find Ms Dickinson a reliable witness. She changed her evidence in relation to two material aspects, one at the start of her evidence, after hearing the claimant give evidence to the contrary, and one during cross-examination. On both aspects her written evidence, before the changes, would have been misleading.

4. I found that Mr. Chisholm and the claimant were both attempting to give honest evidence to the best of their recollection. There were some inconsistencies in the claimant's evidence in relation to his intentions when entering into the relationship, but this seems to me to be likely to arise from the changes in the claimant's understanding of how employment status is determined, rather than from any deliberate attempt to mislead the tribunal. I accept that his answers on whether or not his partner was paid a wage by his company were inconsistent and could have been construed as evasive, but ultimately he gave what appeared to be candid answers which did not cast him in the best light. Overall the way in which he gave this evidence does not negatively affect my view of the rest of his evidence.

5. Where I have had to determine a dispute of fact I have done so largely on the basis of supporting documentation or on the basis of which version appears to me to be more likely.

Findings of fact

6. I have limited the findings of fact to those necessary to determine the issue.

7. In 2015 the claimant was alerted by a recruitment consultant, Scott Shepherd, to a position at the respondent company. In March 2015 the claimant attended two job interviews and on 2 April 2015 was offered the position of the respondent's Sales and Business Development Director South. The claimant was also asked, as part of the process, to create a mock PowerPoint presentation for a client.

8. The respondent interviewed a number of other individuals, a couple of which were 'very very good' but the claimant was selected because he had a very good track record in sales, he was a 'likeable guy' and he fitted the bill better.

9. The offer letter sets out the terms of the offer of employment including an initial annual salary of £75,000 with a car allowance of £7,500, a commission package and bonus. The letter provides that a mobile telephone, laptop and iPad will be provided and private healthcare and pension scheme will be offered. After some negotiation on terms the claimant accepted a slightly revised offer of employment on 23 April 2015 to start on 5 May.

10. Before the claimant started work he asked the respondent to enter into a consultant-client relationship with Timothy Platt Limited rather than an employer-employee relationship. He had taken advice from his accountant and his insurers on how this could be achieved.

11. In order to achieve this he incorporated a company (Timothy Platt Limited) on 5 May. There were several discussions between the claimant and Mr. Chisholm about this proposal before it was agreed.

12. In a letter to Mr. Chisholm of the same date he states that he has taken financial and legal advice regarding the benefits and risks of a consultant-client relationship and sets out a summary of those advantages. The claimant states that the main benefits for him are the tax savings, because he can attribute certain costs to the business such as his accommodation in London and the more favourable tax rate when taking income as dividends. The benefits for the respondent are identified as follows:

    1. My services being covered by my company's professional indemnity insurance;
    2. Using my company's London mailbox address (…) as your own;
    3. All travel costs within the M25 motorway included in my basic charge;
    4. All mobile telephone costs included in my basic charge;
    5. Not being burdened with many unusual obligations of an employer.

13. The letter also identifies the risks as follows:

    > The main risk of a consultant-client relationship is that of it being claimed that I am disguised employee under the IR35 legislation. However, the enclosed contract would bring our relationship outside the IR35 legislation, eliminating the associated risk. This is reinforced by the fact that the proposed working practices, particularly that I will be working remotely and with a high level of autonomy, are not the working practices of a typical employee.

14. Given that the initial offer of employment was for remote working, I find that the description of the 'proposed working practices' is a reference to the role itself, whether carried out under a contract of employment or as a consultant.

15. The claimant enclosed a copy of the proposed contract. The respondent has a copy signed and dated by the claimant on 5 May 2015, so I find on the balance of probabilities the claimant enclosed the signed copy with that letter. Although the claimant had drafted the first page of the contract, which sets out particulars such as the dates, hourly charges and the nature of the services, the rest of the agreement was a pro forma provided by his insurers presumably, as stated in the letter, drafted to 'bring the relationship outside the IR35 legislation'.

16. The respondent took legal advice and, at some point, probably shortly after 5 May, agreed to the proposed contract for services.

17. The following terms of the contract for services are relevant:

    CONTRACT SCHEDULE

PARTICULARS

…

Commencement date	05 May 2015
Completion date	29 April 2016
Nature of the consultancy services:	The Consultancy shall provide services to facilitate an increase in the Client's turnover, geographically focusing on, but not limited to, London and the South East. The services shall include sales and business development activity, having given due consideration to prevailing best practice, and other services as may be agreed between the parties.

…

NOTICE OF EARLY TERMINATION

To be given by the Consultancy	90 days
To be given by the Client	90 days

…

2 CONSULTANCY

2.1 The Consultancy's obligation to provide the Consultancy Services shall be performed by one or more employees of the consultancy as the consultancy may consider appropriate (the "**Staff**"), subject to the Client being reasonably satisfied that the Staff has the required experience, qualifications and skills to provide the Consultancy Services to the required standard.

2.2 The Consultancy has the right, at its own expense, to enlist additional or substitute Staff in the performance of the Consultancy Services, or may subcontract all or part of the Consultancy Services, provided that the Consultancy provides details, whenever practical, of the proposed substitute or subcontractor ahead of the planned substitution and subject to the Client being reasonably satisfied that such additional Staff or any such subcontractor has the required experience, qualifications and skills to provide the Consultancy Services to the required standard

2.3 Where the Consultancy provides a substitute or sub-contracts all or part of the Consultancy Services pursuant to clause 2.2, the Consultancy shall be responsible for paying the substitute or subcontractor and shall ensure that any agreement between the Consultancy and any such substitute or sub-contractor shall contain obligations which correspond to the obligations of the Consultancy under the terms of this agreement.

2.4 The Consultancy shall take reasonable steps to avoid any unplanned changes of Staff assigned to the performance of the Consultancy Services but if the Consultancy is unable for any reason to perform the Consultancy Services the Consultancy should inform the Client on the first day of unavailability and in such case shall provide a substitute as soon as it is practicable to do so, subject to the provisions of clause 2.2.

…

2.6 Save as otherwise stated in this Agreement, the Client acknowledges and accepts that the Consultancy is in business on its own account and the Consultancy shall be entitled to seek, apply for, accept and perform contracts to supply its services to any third party during the term of this Agreement provided that this in no way compromises or is to the detriment to the performance of the Consultancy Services to the Client.

…

7 EQUIPMENT

7.1 The Consultancy shall provide at its own cost, subject to any agreement to the contrary specified in the schedule, all such necessary equipment as is reasonable for the satisfactory performance by the Staff and any substitutes and subcontractors of the Consultancy Services.
…

8.2 The Consultancy may provide the Consultancy Services at such times and on such days as the Consultancy shall decide but shall ensure that the Consultancy Services are provided at such times as are necessary for the proper performance of the Consultancy Services.

8.3 The relationship between the Parties is between independent companies and nothing contained in this Agreement shall be construed as constituting or establishing any partnership or joint venture or relationship of employer or employee between the Parties or their personnel.

…

10 FEES

10.5 Nothwithstanding the provisions of clause 8.2, the Consultancy will be able to suspend the provision of the Consultancy Services for up to 38 days per annum per each Staff (or pro rata where the Consultancy Services are for less than one year). The Consultancy shall be responsible to pay the Staff all sums due in respect of those days upon which the Consultancy Services provided are suspended pursuant to the Working Time Regulations 1998 or otherwise.

…

DURATION

12. 1 This Agreement shall commence on the commencement date specified in the Schedule and shall continue until either:
(A) the completion date as specified in the Schedule, at which time this Agreement shall expire automatically; or
(B) this Agreement is terminated early by the Consultancy or the Client upon giving the required notice as set out in the Schedule.

…

RELATIONSHIP BETWEEN THE CLIENT AND THE CONSULTANCY

16.1 The Consultancy acknowledges to the Client that there is no intention on the part of the Consultancy, its Staff, substitutes or sub-contractors or the Client to create an employment relationship between any of those parties and that the responsibility of complying with all statutory and legal requirements relating to the Staff of the Consultancy (including but not limited to the payment of taxation, maternity payments and statutory sick pay) shall fall upon and be discharged wholly and exclusively by the Consultancy.

…

16.3 The Client is under no obligation to offer work to the Consultancy and the Consultancy is under no obligation to accept any work that may be offered by the Client. Neither Party wishes to create or imply and mutuality of obligation between themselves either in the course of, or between, any performance of Consultancy Services under this agreement.

18. The parties agreed the ‘basic hourly charge’ so that the remuneration received by the claimant would be roughly equivalent to the salary that had been offered to the claimant as an employee. On the basis that the claimant would work 5 days a week and take 38 days off per year, which would have

been his contractual holiday entitlement if taken on as an employee, the parties divided the annual salary by the days that he would bill for, effectively intending to 'roll up' his holiday pay in his daily rate. The claimant did not explain how the daily rate was converted to the hourly charge, but given that the claimant billed for 7 hours a day, I assume that it was divided by 7.

19. Although Mr. Chisholm's witness statement stated that the claimant told him that he had other business interests, in oral evidence the only examples he gave were work the claimant carried out for his grandmother, for which Mr. Chisholm said the claimant billed through a consultancy, and writing articles for which he got paid. As the documents show that the claimant only incorporated his company on 5 May 2021, it is more likely that Mr. Chisholm has misremembered what he was told. I accept that the claimant was not carrying out any paid work for his grandma, or any work for other clients via an existing consultancy business. Further the letter setting out what the claimant asserted to be the benefits to him at the time of a consultancy arrangement makes no mention of carrying out any other work for other clients.

20. I find that it was always intended that the claimant would only carry out work for the respondent. Apart from the fact that the claimant had no other clients when the agreement was entered into, the respondent had advertised for, and therefore clearly had a business requirement for a full-time employee. This is supported by the fact that the claimant billed for 7 hour days, 5 days a week. I find that clause 2.6 is not a reflection of the parties' intentions.

21. I find that the parties never intended that the substitution clause should form part of their agreement. The recruitment exercise consisted of a number of interviews, a mock presentation, a costing exercise and a negotiation exercise. The respondent went to great lengths to ensure they had the right person for the job. They had initially intended to enter into a relationship which was explicitly a contract of service, which would not have allowed the use of a substitute.

22. The respondent agreed to a consultant-client arrangement at the claimant's instigation and on the basis that his insurer had provided those pro forma contractual terms in order to eliminate the risk of it being claimed the claimant was a 'disguised employee' by bringing the relationship outside the IR35 legislation.

23. I find as a fact that was the reason for the inclusion of the substitution clause, not because the parties intended anyone other than the claimant to carry out the role. Substitution was so far from Mr. Chisholm's mind that when asked about it during the hearing, he assumed that the question related to the claimant sending other employees of the respondent from his team to carry out part of his role.

24. The claimant's evidence on whether he genuinely intended to enter into a consultancy arrangement, or whether he was, in effect, trying to mislead the revenue as to the true nature of the arrangement was inconsistent. Initially

he stated that the agreement was 'supposed to be for consultancy services but turned out to be something different'.

25. Later he stated that the job was 'effectively a full time job with a full time salary but [we] had to break it down for the purpose of the invoices'. In response to a direct question from me he stated 'I was trying to relabel [it] to claim that money from the revenue. The only benefit for me was the favourable tax position – was rehashing the employment offer in a way that would allow me to achieve those financial benefits'.

26. In re-examination, his evidence was slightly different again, stating in response to a question on whether or not the reference in the 5 May letter to working remotely with a high level of autonomy had happened in practice, 'I suppose that what I was hoping would happen, could have shaped up to be more traditional consultant. The way the relationship transpired… I had applied for a job on an employed role and had twisted it to fit a consultancy, but if had decided to focus on consultancy aspect we could have made it look like that but in practice it was always as an employee and how an employee would act. I did probably hope it would be different because would have had more freedom, but relationship turned out to be what I applied for originally'.

27. I find, on the basis of the oral evidence from both parties and the letter of 5 May, that the parties intended at the outset to create a relationship equivalent to the employment relationship to which they had initially agreed, but one which was treated by the revenue in a different way. This was the true agreement. It had always been intended that as an employee he would be working remotely and with a high level of autonomy. The reason for attempting to reframe it as a consultancy agreement was purely the financial benefit to the claimant, including the ability to offset accommodation costs and the more favourable tax rate.

28. Although the written agreement contains a term excluding mutuality of obligations, I find that the parties' true agreement was to create a relationship akin to a full time salaried sales director i.e. where the claimant would be entitled to work and be paid every week on an ongoing basis, unless he was absent by arrangement. Clause 16.3 was, I find, one of the clauses inserted by the insurers in the pro forma in an attempt to 'bring the relationship outside the IR35 legislation'. It was not a reflection of the parties' genuine intentions and agreement as to how the relationship would operate.

29. In terms of the operation of the agreement in practice, I make the following findings of fact.

30. The claimant was provided with the equipment that he would have been provided as an employee, although he had a preference for using his own laptop for work.

31. The claimant consistently billed for 7 hours a day, 5 days a week. He did not generally work 9-5 and, even when he moved to York, was not consistently

in the office. In effect he operated as might be expected for a salaried sales director: he had a target to reach and as a senior salaried employee was not expected to be at his desk every day, nor to down tools at 5pm. As Mr. Chisholm said, 'at some point he would put in the 7 hours'. Although other directors might be in the office more, Mr. Chisholm explained that sales was different, because they would be meeting clients. I find that the claimant's working pattern was similar to what would have been expected if he had been taken on under the originally proposed employment contract.

32. There is evidence in the bundle of him checking with the respondent before taking time off and I find that that was the general practice.

33. The claimant did operate with a high level of autonomy, but no more than would be expected of an employee in his role and at his level. He was expected to attend SMT meetings unless he had other commitments, for example a meeting with one of the respondent's clients. He played a full part in those SMT meetings.

34. I find that the claimant was, in effect, line managed by Mr. Chisholm. They had regular discussions about his work. Although there was no formal appraisal there was an annual meeting at which his work was discussed and at which an increase in his hourly charge was agreed. He was never subject to any disciplinary action although it is not suggested that any matters arose which would ordinarily have led to disciplinary action for an employee.

35. He never sent a substitute to carry out his work, and his company did not employ any staff to carry out the consultancy services, save that his partner was paid a salary by his company. Initially she carried out no work and was paid a salary 'as a tax efficient way to extract money from the company', but at some stage she did start to submit the claimant's invoices to the respondent for him.

36. Most of the respondent's clients were not told that the claimant was a consultant, and he was described in presentations, on the website, on letterheads or in his email/letter signature to the respondent's clients as either 'Business Development Director' or 'Sales & Marketing Director'. Some of the clients knew that the claimant was a consultant, and I do not accept that it was deliberately kept a secret from other employees. Although the claimant was involved in preparing the content of the website, there is no suggestion that Mr. Chisholm or anyone else at the respondent objected in any way to the presentation of the claimant externally as 'Business Development Director' or 'Sales & Marketing Director'.

37. The claimant was able to enter into contracts on the respondent's behalf. There is some dispute as to whether or not he needed authority to enter into contracts over £1 million, but I find that the presence of an agreed limit would not be inconsistent with being an employee in any event.

38. Although the written contract for services was stated to end in April 2016, the claimant simply continued to work for the respondent thereafter.

39. When the existing sales director, Helen Smith, left in about February 2016 the claimant took over her role as sales director. He inherited a team (of the respondent's employees) and it became part of his role to build that team. Once the claimant had a team, he became entitled to commission on his team's sales. He was involved in recruitment and carried out appraisals of people in his team. He heard a disciplinary appeal, and the related documents do not inform the member of the staff that the appeal is being chaired by someone external. From about early 2017 the claimant relocated to York, where the respondent's office was based.

40. The respondent asked the claimant on a number of occasions to become an employee and the claimant eventually agreed, and his contract of employment commenced in November 2018. The precise terms that were agreed are in dispute, but on any version the written terms of the contract of employment differed significantly from the written terms of the contract for services.

41. I am satisfied though that the true agreement, as found above, between the parties as to their relationship between May 2015 and November 2018 was not so different to their agreement as to their relationship from that date onwards. I find that any significant differences in the terms of the agreement were a reflection of the fact that the parties were no longer attempting to 'bring the relationship outside the IR35 legislation'. The way the role operated in practice was also fundamentally the same.

The law

42. The starting point is the definition of employee under the ERA. It is helpful to include the definition of worker.

    S.230(1) defines an "employee" .as an individual who has entered into or works under (or, where the employment has ceased, worked under) a contract of employment.

    S.230(2) provides that a contract of employment means a contract of service or apprenticeship, whether express or implied, and (if it is express) whether oral or in writing.

    S.230(3) defines a "worker" as an individual who has entered into or works under (or, where the employment has ceased, worked under):
    (a) a contract of employment , or
    (b) any contract, whether express or implied and (if express) whether oral or in writing, whereby the individual undertakes to do or perform personally any work or services for another party to the contract whose status is not by virtue of the contract that of a client or customer of any profession or business undertaking carried on by the individual.

43. In **Uber BV and others v Aslam and others** [2021] ICR 657, a decision on worker status, the Supreme Court held that not only is the written agreement not decisive of the parties' relationship, it is not even the starting point for determining worker status. The Court held that the determination of "worker"

status is a question of statutory interpretation, not contractual interpretation, and that it is therefore wrong in principle to treat the written agreement as a starting point.

44. This approach is justified in employment cases, according to the Supreme Court, because of:

(i) the purpose of the legislation, which is to give protection to vulnerable individuals who are in a subordinate and dependent position in relation to a person or organisation who exercises control over their work; and
(ii) that fact that the relevant statutes contain prohibitions on contracting out.

45. As the Supreme Court explain, at para 85,:

> This does not mean that the terms of any written agreement should be ignored. The conduct of the parties and other evidence may show that the written terms were in fact understood and agreed to be a record, possibly an exclusive record, of the parties' rights and obligations towards each other. But there is no legal presumption that a contractual document contains the whole of the parties' agreement and no absolute rule that terms set out in a contractual document represent the parties' true agreement just because an individual has signed it. Furthermore, as discussed, any terms which purport to classify the parties' legal relationship or to exclude or limit statutory protections by preventing the contract from being interpreted as a contract of employment or other worker's contract are of no effect and must be disregarded.

46. I find that the approach in **Uber** must also apply as a matter of principle to the determination of employee status. Further, it confirms the approach of the Supreme Court in **Autoclenz Ltd v Belcher and others** [2010] IRLR 70 that the role of the tribunal is to identify the parties' true agreement.

47. Mr Justice MacKenna in **Ready Mixed Concrete (South East) Ltd v Minister of Pensions and National Insurance** [1968] 1 All ER 433, QB held that for a contract of service to exist three conditions needed to be fulfilled:
    (i) the servant agrees that, in consideration of a wage or other remuneration, he/she will provide his own work and skill in the performance of some service for his master;
    (ii) he agrees, expressly or impliedly, that in the performance of that service he will be subject to the other's control in a sufficient degree to make that other master; and
    (iii) the other provisions of the contract are consistent with it being a contract of service.

48. This description was approved by the Supreme Court in **Autoclenz** where Lord Clarke called it the 'classic description of employment'.

49. In relation to personal service, the principles were summarised by the Court of Appeal at para 84 of **Pimlico Plumbers Ltd v Another** [2017] EWCA Civ 51 (upheld by the Supreme Court in [2018] UKSC 29):

> In the light of the cases and the language and objects of the relevant legislation, I would summarise as follows the applicable principles as to the requirement for personal performance. Firstly, an unfettered right to substitute another person to do the work or perform the services is inconsistent with an undertaking to do so personally. Secondly, a conditional right to substitute another person may or may not be inconsistent with personal performance depending upon the conditionality. It will depend on the precise contractual arrangements and, in particular, the nature and degree of any fetter on a right of substitution or, using different language, the extent to which the right of substitution is limited or occasional. Thirdly, by way of example, a right of substitution only when the contractor is unable to carry out the work will, subject to any exceptional facts, be consistent with personal performance. Fourthly, again by way of example, a right of substitution limited only by the need to show that the substitute is as qualified as the contractor to do the work, whether or not that entails a particular procedure, will, subject to any exceptional facts, be inconsistent with personal performance. Fifthly, again by way of example, a right to substitute only with the consent of another person who has an absolute and unqualified discretion to withhold consent will be consistent with personal performance.

50. In **Nethermere (St Neots) Ltd v Gardiner and Anor [**1984] IRLR 240 CA Lord Justice Stephenson held that there must be an irreducible minimum of obligation on each side to create a contract of service. The Nethermere decision was cited and approved by Lord Irvine in **Carmichael and Anor v National Power Plc** [1999] ICR 1226, HL, when he posited that a lack of obligations on one party to provide work and the other to accept work would result in "an absence of that irreducible minimum of mutual obligation necessary to create a contract of service". It is the absence of *mutual* obligations that is crucial. It is not sufficient for there to be an absence of obligation on the part of the employer to provide work. There has to be an absence of obligation of the employer to provide work and an absence of obligation on the part of the employee when work is offered to accept that work (**Wilson v Circular Distributions Ltd** [2006] IRLR 380.

51. The tax and national insurance position will be relevant, but is not determinative.

52. The label attached by parties to a relationship is not determinative, and a claimant is not estopped from claiming that he is an employee by the fact that he has chosen to call himself self-employed for fiscal advantage: **Young & Woods v West** [1980] EWCA Civ 6.

Application of the law to the facts

53. The respondent has conceded that the claimant was a worker within s 230(3) of the ERA. I asked Ms Rezaie whether this amounted to a concession that the claimant was under an obligation to provide personal service. Although she was not able to explain why the respondent might have conceded that the claimant was a worker if it believed he did not satisfy the statutory definition, she asserted that there was no concession in relation to personal service and I have proceeded on that basis.

54. In determining whether or not the claimant is an employee, I must identify the 'true agreement' between the parties. This means the legal obligations rather than the parties' private intentions. In accordance with the Supreme

Court decision in **Uber**, I should consider whether the conduct of the parties and other evidence shows that the written terms were in fact understood and agreed to be a record, possibly an exclusive record, of the parties' rights and obligations towards each other, but there is no legal presumption that a contractual document contains the whole of the parties' agreement and no absolute rule that terms set out in a contractual document represent the parties' true agreement just because an individual has signed it.

55. Further, the Supreme Court held that any terms which purport to classify the parties' legal relationship or to exclude or limit statutory protections by preventing the contract from being interpreted as a contract of employment or other worker's contract are of no effect and must be disregarded.

56. On the basis of my findings of fact above, I find that the written agreement was not understood to be an exclusive record of the parties' rights and obligations towards each other. The pro forma terms of the agreement were presented to the respondent and accepted by them simply as a means of 'bringing the relationship outside the IR35 legislation'.

57. It is clear, on the basis of my findings of fact above, that the true agreement was to create a relationship which was equivalent to the original employment contract, in order to take advantage of the favourable tax position for the claimant. I find that these pro forma terms did not form part of the true agreement between the parties. This applies in particular to the provisions on personal service and the exclusion of mutuality of obligation.

58. Having found that these terms did not form part of the true agreement between the parties, I do not need to consider if these terms are of no effect and should be disregarded on the basis that they purport to classify the parties' legal relationship or to exclude or limit statutory protections by preventing the contract from being interpreted as a contract of employment. I was not addressed by either party on this point, but if I had concluded that these terms formed part of the true agreement, I would have concluded, subject to hearing submissions on the issue, that most of the pro forma terms were of no effect and should be disregarded. See para 80 of the judgment of the Supreme Court in **Uber** on the effect of the statutory prohibitions on contracting out:

> These provisions, as I read them, apply to any provision in an agreement which can be seen, on an objective consideration of the facts, to have as its object excluding or limiting the operation of the legislation. It is just as inimical to the aims of the legislation to allow its protection to be limited or excluded indirectly by the terms of a contract as it is to allow that to be done in direct terms.

59. Having concluded that those terms formed no part of the true agreement between the parties, I do not need to consider whether any power of substitution or exclusion of mutuality of obligation contained in the written agreement is inconsistent with a contract of employment.

60. I turn now to consider whether the nature of the relationship, as contained in the true agreement between the parties, was one of employment.

61. I find that there was mutuality of obligation. Although expressed in writing to be simply a matter of the claimant invoicing for the work he carried out, it is clear that the true agreement was for full-time work. The hourly charge was calculated on the basis that it was expected that the claimant would invoice for 7 hours a day, 5 days a week on an ongoing basis. The way that the hourly charge was calculated anticipated that the claimant would take 38 days holiday.

62. The true agreement was for an ongoing overarching commitment on both sides, equivalent to that which had been initially agreed as employment. This is supported by the fact that although the written contract for services was stated to end in April 2016 the claimant simply continued to work at that point, with nobody seeing the need to enter in to any further discussions.

63. I have concluded that the substitution clause did not form part of the true agreement. It is clear that the true agreement was for the claimant to carry out the work himself, and therefore there was an obligation of personal service.

64. Turning to control, I note that the claimant was a senior professional and that the employed position for which he originally applied for was already a remote working position with a high level of autonomy. The claimant spoke regularly to Mr. Chisholm about his work and he was expected to attend SMT meetings and provide updates on his work. He had the equivalent of an appraisal every year. He checked with the respondent before taking time off. For a senior employee, I find that this is a sufficient degree of control to amount to employment rather than self-employment.

65. Secondly I have considered the level of integration into the respondent's business. The claimant was presented externally and to most, if not all, of the respondent's clients and potential clients as the 'Business Development Director' or 'Sales & Marketing Director'. There was, in general, no reference to his status as a consultant. His company was incorporated specifically to carry out this particular role, and it had no other clients. When the Sales & Marketing Director left the claimant took over this role and led an internal team. The claimant carried out their appraisals. He was involved in recruitment and, on one occasion, disciplining other staff. He had authority to contract with third parties and bind the respondent. He played an active part in SMT meetings, not just in relation to sales. The claimant had no other clients and his company was incorporated specifically and solely for the purpose of carrying out this role for the respondent. I find that the claimant was fully integrated into the respondent's organisation.

66. I accept that there are factors that point away from employment status. The way in which the claimant was paid, the fact that he charged VAT and the fact that he engaged his partner to carry out some administrative work all point towards him being in business on his own account. Further, the fact

that he had no clearly expressed contractual holiday entitlement or contractual entitlement to sick pay points away from employment. However these factors are equally consistent with an attempt to present what was a genuine employment relationship as self-employment in order to enable the claimant to benefit from the financial and tax advantages of that status.

67. Taking into account all the above, I find that the claimant was an employee within s 230 during the relevant period.

Employment Judge Buckley

Date: 23 July 2021